

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICO MARQUEZ ESPITIA,

Defendant and Appellant.

A141533

(Solano County
Super. Ct. No. FCR296702)

Rico Marquez Espitia appeals from a judgment of conviction and sentence imposed after a jury found him guilty of first degree murder. He contends (1) the trial court erred by denying his motion to dismiss a gang allegation; (2) the jury's implied finding of premeditation was not supported by substantial evidence; (3) the judge's absence from the bench during a witness's tantrum, while the trial was in recess, constituted structural error; and (4) the court should have granted a new trial based on newly discovered evidence. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

An information accused Espitia of the murder of Quentin Nears. (Pen. Code, § 187, subd. (a).)¹ It further alleged that he used and discharged a firearm in committing the offense (§ 12022.5, subd. (a)(1), § 12022.53, subds. (b), (c), (d), (e)(1)) and that the offense was committed for the benefit of, or in association with, a criminal street gang (§ 186.22, subd. (b)(1)).

¹ All statutory references herein are to the Penal Code.

Espitia filed a motion to dismiss under section 995, arguing inter alia that there was insufficient evidence at the preliminary hearing to support the gang allegation. The motion was denied, and the matter proceeded to a jury trial.

A. Evidence at Trial

The prosecutor's theory at trial was that Espitia, a member of the Norteño criminal street gang, threatened victim Nears at a liquor store and, weeks later as part of gang business, assaulted another individual and followed through on his threat to kill Nears.

1. Confrontation between Espitia and Nears at a Liquor Store

Mariah Degros testified that Nears was her best friend and she had known Espitia for about six years. Approximately one and a half to two months before Nears was shot, there was an altercation between Nears and Espitia at a liquor store in Vacaville.

Degros came out of the liquor store and went to her car, where Nears and a friend were waiting. Espitia arrived in another car with his girlfriend (Danaya Jordan), whom Degros also knew, and Espitia's friend "Weedo" (Daniel Macias).² Jordan confronted Degros, saying, "What's up, you little whore?" Meanwhile, Espitia and Macias approached the passenger side of Degros's car and confronted Nears. Espitia and Nears argued and yelled loudly at each other; then Espitia told Nears, "I have something for you," pulled up his shirt, and showed Nears a gun. Degros saw the handle of the gun, which was tucked into Espitia's waistband, and she understood Espitia's statement to Nears to be a threat. Nears told Degros to drive away, and she did.

2. Espitia's Assault of a Sureño on the night Nears was Shot

Francisco Arroyo testified that on the evening of July 30, 2011, he and two friends were sitting and talking near the back of the Alamo Gardens apartment complex at 1501 Alamo Drive in Vacaville (Alamo Gardens). Espitia, whom Arroyo had known since middle school, approached them from a trail behind the apartment complex. According

² Evidence indicated that Jordan and Macias, as well as Espitia, were members of the Norteño criminal street gang.

to Arroyo, Espitia was wearing dark jeans or shorts, a white long-sleeved shirt, and his hair in a ponytail.

Arroyo was previously associated with the Sureño criminal street gang, while Espitia was a member of the Norteños. Espitia told Arroyo, “You’re a fucking scrap,” a derogatory term Norteños apply to Sureños, and hit Arroyo in the back of the head with enough force to drop him to the ground. Espitia said he was going to kill Arroyo, and walked away.

Arroyo was scared by this encounter, because Espitia walked with a limp as if he had a weapon. About five to ten minutes after Espitia left, Arroyo heard three or four gunshots coming from the front of Alamo Gardens.

At 9:13 p.m., Espitia sent a fellow Norteño gang member the following text message: “I just fiered [sic] onthat scrap n tha gardenz.” According to Officer Howisey, the prosecution’s gang expert, this message referred to assaulting (or shooting) a Sureño.³

Antonio Jackson confirmed Arroyo’s account of the assault. He was with Arroyo at the time, and noticed that Espitia was wearing shorts, a black or white T-shirt, and “tall” white socks, with his hair in a ponytail and the “side shaved.”⁴ Espitia said something to Arroyo like, “Are you a scrap?” Then he hit Arroyo. Espitia told Arroyo, “I should shoot you right now” and put his hands in his waistband, but walked away. About seven to 10 minutes later, Jackson heard gunshots.

³ If Espitia was referring to hitting someone, a reasonable inference is he was referring to his assault on Arroyo; in closing argument, the prosecutor left open the possibility that he was referring to shooting Nears, although there was no evidence that Nears was actually a Sureño.

⁴ Jackson told police that Arroyo’s assailant was Hispanic, wearing a black baseball cap and tan “Dickies” shorts. However, this was admitted not for its truth, but to explain the follow-up by police. Police later collected tan dickey-type shorts at Espitia’s residence.

3. The Shooting of Nears

Around 9:17 p.m. on July 30, 2011, police officers were dispatched to Alamo Gardens on a report of shots being fired. They found Larry James, who was in a panic, saying his friend had been shot. The body of Nears, an African-American male, was on the ground. He had sustained a gunshot wound to his chest, was not moving or breathing, and had no pulse.

An autopsy determined that Nears died as a result of multiple gunshot wounds. One bullet had entered his front left chest and traveled to the left and downward; another bullet had entered the right side of his back and traveled downward; and a third bullet had entered the left side of his back and traveled upward. The shots were fired from at least three feet away.

The three bullets recovered from Nears's body were determined to be .38-Special or .357-Magnum ammunition fired from a revolver such as a .38-caliber Smith & Wesson.

4. James's Accounts of the Shooting of Nears

a. James's Statement to Police at the Murder Scene

At the scene, James told police that he was walking with Nears when a man approached them; James heard gunshots and ran, and then he saw Nears on the ground. He described the shooter as a dark-skinned white male or a light-skinned Hispanic male with short black hair, wearing a white T-shirt and blue dickey-type shorts. James claimed he did not know who the shooter was, but he could identify the shooter if he saw him again.

b. Detectives' Interview of James on August 2

Three days after the shooting on August 2, 2011, Detective Chris Lechuga and Detective Vince Nadasdy attempted to obtain more information from James about Nears's shooter. Having learned about the prior incident between Nears and Espitia, they showed James a photographic lineup that included Espitia's photo. James did not identify anybody, appearing reluctant and stating that he did not want to be labeled a "snitch."

Of the photographs shown to James on August 2, 2011, photograph four depicted Espitia and photograph three depicted a person named Enrico Ochoa. Both went by the name “Rico.” On cross-examination, Detective Nadasdy acknowledged that James had paused at photograph three, set it aside, looked at the remaining photos, returned to photograph three and said, “shit, man!” Detective Nadasdy asked James if he recognized anyone from the photos as the shooter, and James replied, “No.” James said the person in photograph three looked like the shooter, but the shooter had a rounder or fatter face (like photograph four of Espitia) and the shooter’s hair more nearly resembled the very short hair in photograph six. In terms of resemblance to the shooter, James rated photograph four as a “four” and photograph three as a “five and a half.” Like Espitia, Ochoa was a known Norteño gang member. The detectives suspected that James was not being truthful when he failed to make an identification.

c. James’s Statement to Nears’s Mother

Nears’s mother, Joyce Thurman, testified that James came to her home a few days after Nears was killed. Distraught and shaking, James told her what had happened to her son.

James stated that he was talking to Nears when “Rico” walked up “kind of fast,” as if he was going to fight Nears, and started shooting. James ducked down and ran to the side. Nears ran, too. James later saw Nears on the ground and tried to hold him up, but Nears was too heavy. Nears said, “I’m hit” and “I can’t believe he—Rico shot me.” James clarified that the shooter was “Rico Espitia,” who “runs with some guys called Nortos;” he described Espitia as having a “lighter-shaded” skin tone with hair “going back with the sides down.”

Thurman told Detective Lechuga that James had identified Espitia as her son’s killer. She also told Lechuga that Degros had told her about the earlier incident between Espitia and her son.

d. Detectives’ Interview of James on August 24

After several unsuccessful attempts to speak to James again, detectives found him outside his sister’s residence on August 24, 2011. Detective Lechuga recorded the

interview, which was played for the jury. Throughout the interview, the detectives told James they wanted to arrest the right man and not put the wrong man in jail. Again, James was reluctant and did not want to be labeled a “snitch.” Toward the end of the interview, Lechuga showed James six photographs, one at a time. According to Lechuga, when James got to photo number four (Espitia), James pointed at it and said, “boom lauw,” walked backwards a couple of steps, pointed at the photograph again and gave the detective a “thumbs up” and said, “There you go, right there. [W]e good?”⁵

e. James’s Testimony at Trial

James was less forthcoming at trial. He testified that he had known Nears for years and was living at Alamo Gardens on July 30, 2011. As he was walking from a store across the street that evening, he saw Nears and walked with him into the apartment complex. As they walked toward James’s apartment, no one was around except for a man who was walking towards them. The man said to Nears, “What’s up?” Nears replied, “What’s up?” James walked a little farther with Nears behind him, and then he heard three gunshots. James and Nears both started to run, but Nears fell to the ground. The person who said “What’s up?” ran across the street. James went to Nears and picked him up; Nears said he was dying. In his trial testimony, James denied that Nears said, “I can’t believe Rico shot me.”

James testified that the person who said “What’s up” was either “white” or Mexican and was wearing dark blue or black shorts and a black hoodie. (Later he testified that he was wearing a white T-shirt and *not* wearing a hoodie.) The shooter’s hair was short or could have been “slicked back.” About a week after the shooting, James moved away from Alamo Gardens.

⁵ The detectives considered this to be an identification of Espitia as the killer. The transcript of the audiotaped interview reads: “[James]: ‘BOOM’.... You know what I’m saying? There you go. [¶] Q. All right. [¶] [James]: No, I’m fucking with you, in a minute. Good? Good? [¶] Q. All right. We’re good. Later. [¶] Q1. Okay. Thanks Larry. . . . [¶] Q: Appreciate it. You see what he did? [¶] Q1. Yeah. [¶] Q. We’re getting a warrant in the morning. Man...”

James acknowledged that police showed him a photo lineup a few days after the shooting, but he did not want to identify anybody or have anything to do with the case. He told the police he was afraid, that “snitches get stitches,” and he was concerned that one day he would be sitting in his car and get shot.

James also acknowledged that he later talked to Nears’s mother (Thurman), but he denied telling her the shooter was a Norteño gang member named Rico who wore his hair in a ponytail. James also denied telling her that Nears said, “I can’t believe Rico shot me.” And he denied telling her that he did not want to identify anyone out of fear of retaliation.

James further testified that he did not want to talk to police on August 24, 2011, and was unaware they were recording the conversation. He denied telling Detective Lechuga that he was scared he would be killed if he disclosed who shot Nears. He denied identifying photo number four, depicting Espitia, as the shooter. He acknowledged that he said “We good?” but claimed it was after he had seen all the photographs, and only to indicate he would rather talk to the police another day. James denied that he knew or ever heard of Espitia.⁶

5. Other Witness Observations

James Borell testified that on July 30, 2011, a little after 9:00 p.m., he was outside his apartment and heard five to six gunshots. Seconds later, he saw a “lighter African-American or a darker Hispanic” run by, wearing a white short-sleeve shirt, black or dark blue baggy pants, and a dark baseball cap, with shoulder-length black hair and a braid on each side.

Kimberley Kimball testified she heard three or four gunshots on July 30, 2011, after 9:00 p.m. She looked out her window and saw a “young kid” running across the

⁶ As discussed *post*, while on the witness stand during the prosecutor’s redirect examination, James became upset when he perceived that the prosecutor was insinuating he moved away from Alamo Gardens because he was afraid, vehemently denying he was afraid and insisting he was not a snitch. James continued his comments in front of the jury after the court had called a recess and left the bench.

street, wearing a white T-shirt and long cargo shorts. He seemed to be dark-skinned, although she was unsure because it was dark out and she could not see his face. The officer who took her statement testified that she had identified the man as an adult Hispanic, with a skinny or slender build, wearing a white T-shirt and white shorts that went past his knees.

Tricia Wagner lived across the street from Alamo Gardens on July 30, 2011, and heard what she thought were firecrackers—five or six pops—a little after 9:00 p.m. She looked out her window within 30 seconds and saw people running in all directions from Alamo Gardens. One man ran quickly into Wagner’s apartment complex, wearing a white T-shirt, black jeans, and a black hoodie. Wagner thought he was Hispanic.

6. Espitia’s Arrest, Cell Phone and Residence

On August 29, 2011, Espitia was arrested in Washington State on a murder warrant. His property, including a cell phone, was booked at the jail.

Espitia’s cell phone was examined pursuant to a search warrant. Stored in the phone was a photo Espitia had taken of himself holding a silver revolver on August 17, 2011. A firearms expert determined that the photo showed a Smith & Wesson revolver capable of firing the three bullets removed from Nears’s body. An expert on the Norteño criminal street gang testified it is fairly common for gang members to take photos of themselves, posing with weapons to memorialize their activities.

Espitia also had a cell phone account with Metro PCS. On the night of Nears’s murder, between 8:53 p.m. and 9:24 p.m., Espitia’s phone had multiple incoming and outgoing calls that were all handled by a cell tower in Vacaville, within about 1.4 miles of Alamo Gardens.

Detectives Lechuga and Nadasdy searched Espitia’s residence and found his and Jordan’s belongings. At the time of the shooting, a person could walk from Espitia’s residence, along the creek, and enter Alamo Gardens through holes in the fence.

7. Expert Witness Testimony about Gangs

Officer Steve Howisey testified as an expert in criminal street gangs, specifically Norteños. He opined that Espitia was a Norteño member. Numerous items in Espitia’s

bedroom indicated his membership, including clothing bearing “XIV.” He had 23 gang-related contacts with police in known gang areas, when he was showing gang signs, wearing Norteño gang attire, wearing a common Norteño hair style in a Mongolian cut, or associating with other known Norteño gang members—including Macias and Espitia’s girlfriend, Jordan.

Officer Howisey noted that Espitia was with Macias and Jordan when he confronted Nears at the liquor store, and once Espitia threatened Nears in the presence of his fellow Norteños, he had to resolve the dispute or he would lose respect—a necessary element of gang membership. When Espitia confronted Arroyo a few minutes before the Nears shooting, called him a Sureño by the derogatory term “scrap,” and threatened to kill him, he was engaged in gang activity. He continued to act for the benefit of or in association with the Norteños when he shot Nears to resolve the matter that began at the liquor store.

B. Verdict and Sentence

The jury found Espitia guilty of first-degree murder and found that he personally and intentionally discharged a firearm (§12022.53, subd. (d)). The jury found, however, that the offense was not committed for the benefit of a street gang.

Represented by new counsel, Espitia filed a motion for a new trial, contending among other things that there was newly discovered material evidence (discussed *post*). The court denied the motion.

The court sentenced Espitia to a term of 50 years to life in state prison, consisting of 25 years to life for first degree murder plus 25 years to life for the firearm enhancement.

This appeal followed.

II. DISCUSSION

A. Motion to Strike the Gang Allegation

At the preliminary hearing, Espitia was held to answer the charges, including the gang allegation (§ 186.22, subd. (b)(1)). After the information was filed, Espitia brought

a motion to dismiss pursuant to section 995, which was directed in part to the gang allegation. Espitia contends the court erred in denying the motion.⁷

1. Evidence at the Preliminary Hearing

The evidence at the preliminary hearing on this issue was similar to what was elicited at trial, although by stipulation it incorporated the testimony of the criminal street gang expert from a previous preliminary hearing. We briefly summarize the evidence here.

Detective Nadasdy testified that the police were familiar with Espitia and his association with the Norteño criminal street gang. When they searched his residence, his belongings included items that indicated his Norteño gang association. His cell phone contained a photograph showing him holding a Smith & Wesson .38-caliber revolver.

Degros testified about the prior confrontation between Espitia and Nears. In June 2011, she drove to a liquor store with Nears and went in. As she returned to her car, Espitia, Jordan and a friend (Macias) drove into the parking lot. Espitia approached Nears, pulled up his shirt and displayed a gun tucked into his pants, and said he had something for Nears. Nears argued with Espitia, and Degros and Nears drove away.

Arroyo testified about his confrontation with Espitia minutes before the shooting. About 9:13 p.m. on July 30, 2011, Espitia approached Arroyo at Alamo Gardens, asked Arroyo if he was a scrap, and punched him. Arroyo had associated with Sureños a couple of years before, and he knew Espitia to be a Norteño.

Espitia said he was going to kill Arroyo, and he limped like he had a weapon; Arroyo told Detective Lechuga that he thought Espitia had a gun.

According to Detective Nadasdy, Jackson confirmed that Espitia said he would shoot Arroyo for being a “scrap”, and Espitia motioned to his waistband, gestured as if he had a gun, and punched Arroyo in the head. Jackson positively identified Espitia from a series of photos.

⁷ Respondent does not dispute that Espitia may raise the issue on appeal, but he must show that he did not receive a fair trial or was otherwise prejudiced. (See *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.)

Detective Howisey, as an expert in criminal street gangs and particularly the Norteños, testified that Espitia is a member of the Norteños, in light of his numerous police contacts when associating with other known Norteños. Howisey opined that Espitia murdered Nears for the benefit of, at the direction of, or in association with the Norteño criminal street gang, based on the evidence that (1) shortly before shooting Nears, Espitia was engaged in Norteño gang activity when he assaulted Arroyo for being a Sureño, and (2) Espitia had confronted Nears previously at the liquor store in the presence of Macias and Jordan—also known Norteños—and if Espitia had come into contact with Nears after confronting him in the presence of gang members and failed to take action, he would lose face with the gang and be punished for not taking care of gang business. Howisey explained that criminal street gang members promote and further the gang by killing and committing acts of violence to inflict fear and intimidation, so as to enhance the respect and status of the gang. Although Nears was not a rival gang member, the Norteños nevertheless gain status by being known to be violent, which makes rival gangs afraid of them and earns the respect of non-gang people as well.

2. Law

The issue is whether there was probable cause to hold Espitia to answer with respect to the allegation that he shot Nears “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (b)(1).) In this context, probable cause to answer requires evidence such that “a *reasonable person* could harbor a strong suspicion of the defendant’s guilt.” (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 251; *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1071–1072 (*Lexin*).)

3. Analysis

The evidence at the preliminary hearing supported a strong suspicion that Espitia killed Nears for the benefit of a criminal street gang (including other gang members) and with the specific intent to promote or assist gang members’ criminal conduct.

There is no dispute that Espitia was a member of the Norteños, a criminal street gang. Espitia had previously confronted Nears in the presence and with the assistance of

two other Norteño members—Macias and Jordan—in which he displayed a gun in a threatening manner. When Nears and his companions drove away, Espitia was left with unfinished gang business. When he arrived at Alamo Gardens on the night of Nears’s killing, he was armed and ready to take up gang business. He took care of gang business in assaulting Arroyo, whom he considered a Sureño gang member. When Espitia encountered Nears a few minutes later, he took care of gang business again by murdering him, thereby benefitting, and intending to benefit, other Norteños through a vicious display of violence. In light of these facts, Detective Howisey testified that, in his expert opinion, Espitia’s shooting of Nears was for the benefit of the Norteño criminal street gang.

Espitia argues that there was no evidence the killing of Nears was gang-related and that Officer Howisey’s expert opinion was insufficient because there were no crime-related facts to support it. (See *People v. Ochoa* (2009) 179 Cal.App.4th 650, 657 [testimony of gang expert alone is insufficient to support a jury finding of a gang enhancement].) For example, he argues, Espitia did not throw gang signs or wear gang colors when Nears was shot, and witnesses to the shooting did not know Espitia was in a gang. (See *In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1363–1364 [expert witness’s opinion did not constitute substantial evidence that defendant had the specific intent to benefit the gang, where no gang signs or words were used, the crimes were not committed in concert with a gang member, and there was no evidence that the victim or witnesses knew that a gang member was involved].)

We are not persuaded. In the first place, as set forth above, there *was* crime-related evidence that supported Officer Howisey’s expert opinion. Howisey did not just state an opinion about the murder; he supported it with specific facts related to the shooting, Espitia, and the prior confrontation between Espitia and Nears.

Furthermore, Espitia relies on cases that decided whether there was *substantial evidence* to support a jury finding of a gang allegation *beyond a reasonable doubt*. (E.g., *In re Daniel C.*, *supra*, 195 Cal.App.4th at p. 1358; *Ochoa*, *supra*, 179 Cal.App.4th at p. 657; *People v. Ramon* (2009) 175 Cal.App.4th 843, 850; *In re Frank S.* (2006) 141

Cal.App.4th 1192, 1196.) At issue here, however, is whether there was evidence such that “ ‘a reasonable person could harbor a *strong suspicion* of the defendant’s guilt.’ ” (*Lexin, supra*, 47 Cal.4th at p. 1072. Italics added.) At the preliminary hearing, the prosecutor needed only to introduce evidence sufficient to make the showing of a strong suspicion of guilt, and was neither obligated to present additional evidence at the preliminary hearing nor precluded from obtaining additional evidence after the preliminary hearing to bolster the case at trial. Accordingly, Espitia fails to demonstrate the court erred in denying his motion.

Moreover, Espitia fails to establish prejudice. After all, the jury did not find the gang allegation to be true, so Espitia was not directly harmed by the admission of the gang evidence. Espitia argues that he was prejudiced nonetheless, because evidence and argument regarding his connection to the gang and the gang’s activities tainted the jury’s view of him. In particular, he urges, the jury heard that Espitia assaulted Arroyo just before the shooting. (See *People v. Albarran* (2007) 149 Cal.App.4th 214, 217, 229 [where gang evidence was not relevant to motive or intent, admission of evidence of other gang members and unrelated crimes, the Mexican Mafia, and a threat to police was so serious as to render the trial fundamentally unfair].) But this evidence was not the flagrant sort that was at issue in *Albarran*; indeed, the jury was plainly not inflamed by the gang evidence in this case, as shown by its finding that the gang allegation was *not true*. We see no reasonable likelihood that the jury’s hearing that Espitia was a gang member, and that the gang commits crimes, led the jury to find Espitia guilty of a murder that it otherwise would not have found he committed, especially since the jury found that the murder was not perpetrated for the benefit of any gang.⁸ It has not been shown that Espitia was denied a fair trial, and it is not reasonably probable that he would have

⁸ Espitia also argues: “Without the gang evidence, appellant’s alternative explanation, that there was a reasonable chance Nears was shot by Rico Ochoa, would have merited serious consideration.” But Espitia was the one who had had the prior dispute with Nears, not Ochoa.

received a more favorable result if the gang evidence had been excluded. (See *People v. Watson* (1956) 46 Cal.2d 818.)

B. Evidence of Premeditation and Deliberation

The jury was instructed on first degree murder, including the requirement of premeditation and deliberation, as follows: “The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he *carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill*. The defendant acted with premeditation if he *decided to kill before completing the acts that caused death*. [¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.” (CALCRIM No. 521, italics added; see *People v. Boatman* (2013) 221 Cal.App.4th 1253, 1264 [a murder is premeditated and deliberate only where there has been a “ ‘careful consideration and examination of the reasons for or against a choice’ ” to kill]; *People v. Anderson* (1968) 70 Cal.2d 15, 27 (*Anderson*) [there must be a “ ‘pre-existing reflection’ ” and “ ‘careful thought and weighing of considerations’ ”].)

As Espitia points out, premeditation and deliberation are typically found where there is evidence of planning activity, motive, and a preconceived design to take the victim’s life in a particular way—or some extremely strong evidence of planning activity alone, or evidence of motive in conjunction with planning or a preconceived design. (*Anderson, supra*, 70 Cal.2d at pp. 26–27.) However, there is no requirement that these factors “be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive.” (*People v. Pride* (1992) 3 Cal.4th 195, 247.)

Espitia argues that the shooting of Nears was the result of a chance meeting between the shooter and the victim, and the “only evidence we have is that the decision to

shoot was made quickly, in a manner entirely consistent with a rash and unconsidered decision.” But even if the evidence were consistent with an unconsidered decision, it was also consistent with a decision that *was* carefully considered beforehand.

Espitia shot Nears multiple times in the chest and back without any contemporaneous confrontation between them. There was nothing that occurred at the time of their meeting at Alamo Gardens besides an exchange of “What’s up.” In light of the evidence at trial, therefore, the only reason for Espitia to shoot Nears was the dispute that had occurred earlier at the liquor store, in which Espitia displayed a firearm and told Nears he “had something” for him. It would not be unreasonable for the jury to conclude—as Degros did—that Espitia meant this as a threat to Nears. Nor would it be unreasonable to conclude that Espitia had a motive to make good on this threat, particularly since the threat had been made in front of his girlfriend and others, and there was no evidence that whatever had originally prompted the threat had since dissipated. Furthermore, the fact that the liquor store confrontation occurred weeks before the killing, yet Espitia shot Nears virtually on sight, suggests Espitia had not forgotten the need to consummate his threat, but had indeed pre-meditated—thought ahead of time—his killing of Nears when he went to Alamo Gardens armed with a loaded gun. One reasonable inference from this evidence is that Espitia killed Nears after having weighed the considerations for and against the murder.

Of course, whether or not every jury would have found premeditation and deliberation on these facts is not the point. The sole question is whether a reasonable jury *could* have come to the conclusion beyond a reasonable doubt that Espitia killed Nears with premeditation and deliberation. (See *People v. Wharton* (1991) 53 Cal.3d 522, 546 [reviewing court need not be convinced beyond a reasonable doubt that defendant premeditated the murder, but must merely decide whether any rational trier of fact could have been convinced].) The evidence was sufficient to meet this standard.

C. Judge's absence from the Courtroom during James's Recess Tantrum

Espitia contends his murder conviction should be reversed because James engaged in a tantrum on the stand after the trial judge had called a recess and left the bench. The argument has no merit.

1. Background

On direct examination, the prosecutor had asked James at length about whether he was reluctant to identify the shooter out of fear of retaliation. On cross-examination, James reiterated that he had told the police he could not identify the person who shot Nears. The prosecutor's redirect examination returned to the theme of James's fear of retaliation, ostensibly to explain why he said this. The following exchange occurred. "Q. BY MS. UNDERWOOD: Mr. James, you said that you had told Detective Nadasdy that you weren't afraid, but that you simply didn't want to be kicked out of your apartment, right? [¶] A. Right. [¶] Q. Okay. But you actually left that apartment a few days after the murder of Quinten Nears, right? [¶] A. Yes. [¶] Q. Okay. And you left your apartment because you were afraid, because you -- [¶] A. No. I have a daughter. I have a daughter. The apartment is very little. I'm not afraid of nothing. Obviously, I wouldn't deal with this the way you all do. I don't deal with this stuff this type of way. I'm not scared of none of these Mexicans. I'm not scared of nobody. I'm not -- this shit don't scare me. [¶] Q. Okay. You -- [¶] A. I already told you that. You make me mad. I slap the fuck out of him, or whoever. I beat the fuck out of his brother, or whoever. Bring them right now. I'm not scared of nobody. [¶] Q. Okay. [¶] A. You feel me? This Fairfield shit don't scare me. I'm from west Oakland. This shit don't scare me. You better do the homework on where I'm from. None of this scares me -- [¶] Q. All right. So you just -- [¶] A. -- for real. Stop saying I'm scared of him. I'll beat the fuck out of his brother and his uncle right now. For real. Don't play with me like that. Stop asking me about that -- [¶] THE COURT: All right, sir -- [¶] THE WITNESS: -- for real. [¶] THE COURT: -- she's going to ask you another question. Go ahead. [¶] MS. UNDERWOOD: Okay. Q. So did you -- [¶] A. He's a bitch. He ain't nobody. [¶] THE COURT: Hang on, sir. [¶] THE WITNESS: What the fuck you talking about? I'm not

scared of nobody. For real. This shit -- this shit is just to play out here, for real. For real. [¶] THE COURT: Do you have a question? [¶] THE WITNESS: Otherwise, I wouldn't be up here talking, for real. Don't play on me. [¶] Q. BY MS. UNDERWOOD: Did you just decide to move -- [¶] A. Yeah, I just decided to move. I got a daughter. What the fuck you mean? If it was just me, I would have stayed right there. I got brothers with me. And me and my brothers do not rock this way. Man, I don't play that shit. For real. [¶] Q. All right. [¶] A. I ain't got no time to be playing with no Mexicans. They don't scare nobody. For real. [¶] Q. Now, you said -- [¶] A. What the fuck you mean? [¶] Q. Now, you said just now, when -- [¶] A. You just make me mad, for real. Stop asking if I'm scared of them. For real. I'm not scared of them. For real. I'm not scared of no shit -- [¶] THE COURT: We're going to take a little break. *We're going to take a ten-minute recess.* [¶] (Judge Stashyn exits the courtroom)." (Italics added.)

Although the court had called a recess, James continued his remarks (and the court reporter continued reporting), apparently after the judge had started to leave the courtroom and before the jury had been taken out. "THE WITNESS: For real, I beat his brother's ass. For real, right now. I'm talking about his dad and mama. I'll beat his ass. For real. [¶] THE BAILIFF: Chill out. [¶] THE WITNESS: Don't play with me. [¶] THE BAILIFF: Chill out. [¶] THE WITNESS: Stop asking me that shit. [¶] THE BAILIFF: Chill out. [¶] *Take out the jury.* [¶] THE WITNESS: Bitch, don't make me look like no snitch. [¶] THE BAILIFF: Chill out. [¶] THE WITNESS: I never snitched on nobody. For real. You want to rock? I beat the fuck out of you niggas, for real. [¶] THE BAILIFF: Have a seat. [¶] THE WITNESS: Nigga, this Vacaville shit don't scare me, nigga. I'm from the Acorn Projects, nigga. For real. [¶] THE BAILIFF: Chill out. [¶] THE WITNESS: You niggas don't scare me, nigga. [¶] THE BAILIFF: Chill out. [¶] THE WITNESS: I never snitched on you, nigga. [¶] THE BAILIFF: Relax. [¶] THE WITNESS: For real, nigga. If you get out, nigga, you'll see me, nigga, for real. He's a bitch, nigga, for real, nigga. [¶] THE BAILIFF: Chill out. [¶] THE WITNESS: This is for real. Tell that bitch to stop asking me if I'm scared of them. [¶] (Jury exits the courtroom). [¶] (Recess taken)." (Italics added.)

After the recess and outside the presence of the jury, the court admonished James and James indicated he would proceed without further outbursts. The court asked the prosecutor and defense counsel if they wanted any other admonishment. Defense counsel did not request one.

Thereafter, James completed his testimony on redirect and recross, without further incident. After James left the courtroom, the court admonished the jury. “THE COURT: I want to make sure that you understand that it was -- I’m sure you all heard, before we took the break and maybe a little bit afterwards, the witness was a little bit emotional. And he made many comments, including racial epithets and some other comments that were certainly unpleasant and negative. [¶] *You’re not to consider those for any purpose against Mr. Espitia.* [¶] Does anybody have any problem following that admonition? [¶] JUROR NUMBER 1: You said “do not”? [¶] THE COURT: Do not. [¶] JUROR NUMBER 1: Okay. [¶] THE COURT: Do not hold it against Mr. Espitia, any of the nasty negative things, racial or otherwise, that the witness said when we were trying to take our recess, when he just started speaking out of turn. [¶] JUROR NUMBER 1: Okay.” (Italics added.)

2. Analysis

Espitia argues: “Judge Stashyn made a grave error when exiting the courtroom while an unstable and hostile witness was still on the stand. Because she was absent, she could not invoke her authority to silence James in his outburst. This was structural error.”

We disagree. In the first place, we find no error. The judge was on the bench until she called a recess in the proceedings. Espitia provides no authority for the proposition that a judge must remain on the bench *during* a recess, particularly where the recess was called because a witness was upset, threatening to assault the defendant and his family, and refused to obey the court’s directive to “hang on.” In fact, the judge *had* invoked her authority to silence James, but he ignored it, and there is no indication that James (who repeatedly ignored the bailiff as well) would have become silent if requested by the judge in the brief period after the recess was called.

Furthermore, even if the court erred by leaving the bench too soon, there was no *structural* error. Structural errors are reversible per se because they involve matters that go to the reliability of a criminal trial as a vehicle for determining guilt or innocence—such as a biased judge, total absence of counsel, or the failure of a jury to decide an essential element of a crime—and it cannot be determined how the trial would have been resolved if the error had not been committed. (*People v. Anzalone* (2014) 56 Cal.4th 545, 553–554; see *People v. Gamache* (2010) 48 Cal.4th 347, 396; *In re James F.* (2008) 42 Cal.4th 901, 914; *People v. Lightsey* (2012) 54 Cal.4th 668, 699 [errors that may result in a miscarriage of justice because they deny a defendant the constitutionally required “orderly legal procedure” involve “structural defects” in the judicial proceedings].) By contrast, trial errors are those whose effect can be examined in the context of the entire record and are not reversible if deemed harmless. (*Anzalone, supra*, at pp. 553–554.) “There is a strong presumption that any error falls within the trial error category, and it will be the rare case where a constitutional violation will not be subject to harmless error analysis. [Citation.]” (*Id.* at p. 554.)

Here, the judge attempted to control the witness, called a recess when unsuccessful, allowed the bailiff to do his or her job, returned after the recess and explored the situation with counsel, and admonished the jury. The judge was not absent from the proceedings at any critical stage. (Cf. *United States v. Mortimer* (3rd Cir. 1998) 161 F.3d 240, 241–242 [judge’s unexplained disappearance during defense counsel’s *closing argument*, without notice to counsel or the jury, was at a critical stage].) There was no structural error, so any error arising from the court’s handling of the situation is subject to harmless error analysis.

Finally, the judge’s departure from the bench before James ceased his outburst was harmless. The witness, who was upset with the prosecutor and becoming belligerent, continued his rant only for a “little bit” during the recess. The recess was properly called, as it allowed James to calm down. The judge’s departure from the bench did not reflect on the guilt or innocence of Espitia, and nothing significant occurred in the brief period the judge was off the bench. The prosecutor asked no questions and no evidence was

admitted. Nothing that James said during the recess substantively reflected on Espitia's guilt or otherwise made the trial unfair—indeed, James said he was *not* afraid of Espitia and *denied* identifying him as the shooter. And after James finished testifying, the court admonished the jury to disregard the outburst—a curative action that is presumed to be effective. (*Anzalone, supra*, 56 Cal.4th at p. 557 [“In the absence of some indication to the contrary, it is presumed the jury followed the instructions.”].) Defense counsel lodged no objection at the trial, and Espitia's new trial motion made no claim that the court had acted improperly by leaving the bench during the recess.

Espitia nonetheless argues that, after the judge left the bench, James repeatedly called the district attorney a “bitch” who was trying to make him “snitch,” and this played into the prosecutor's theory that James knew Espitia had killed Nears and was only claiming otherwise to protect his reputation. But that idea was already manifestly apparent from Thurmond's testimony, the detectives' testimony, James's testimony on direct examination, and James's statements on redirect before the recess.

Espitia's reliance on *People v. Tupper* (1898) 122 Cal. 424 and *People v. Blackman* (1899) 127 Cal. 248 is plainly misplaced. He contends it was held in these cases that a judge's absence from the courtroom during a trial is reversible error, but that is far too broad a characterization. In *Tupper*, the judge left the bench for 20 minutes during *closing argument*. (*Tupper, supra*, 122 Cal. at p. 425.) In *Blackman*, the judge was absent from the courtroom for about 10 minutes during the prosecutor's *closing argument*. (*Blackman, supra*, 127 Cal. at p. 249.) Here, the judge was not absent during closing arguments—in which the parties are summarizing their view of the evidence and application to the law—or any other critical juncture of the trial. She was absent during a recess, when no witness was being questioned, no evidence was being admitted, and no attorney was arguing to the jury, and the court had made it clear to the jury and counsel that the proceedings were in recess. Espitia fails to establish error.

D. Motion for New Trial

Espitia moved for a new trial on several grounds, including that newly discovered evidence would have affected the jury's findings and trial counsel erred by failing to call

material witnesses. In support of both of these arguments, defense counsel submitted affidavits from two potential witnesses: Espitia's mother and Alicia Shea Burton. Only Burton's affidavit is at issue in this appeal.

According to her affidavit, Burton was across the street from Alamo Gardens on July 30, 2011, when she saw a black sport utility vehicle (SUV), speed into the apartment complex, apparently chasing an African-American male on a bike. Burton heard shooting and saw the SUV speed out of the complex. Later, Burton and her husband saw "Frankie" (presumably Arroyo) who appeared to have been punched in the face. Frankie told them he "got socked up by Rico" in the back of the apartments. Frankie allegedly told Burton, "When those fools were shooting I was getting socked up by Rico." He confirmed it was "Rico the Mongolian" (Espitia) and claimed he did not get a chance to defend himself before he heard shooting and Espitia ran over the wall towards a trailer park. In her affidavit, Burton claimed she had known Espitia's sister from school, and Espitia's sister was close friends with Burton's sister, but Burton did not inform Espitia's sister of this incident until about a year after it occurred.

The court denied the new trial motion "on all bases raised." Espitia contends a new trial should have been granted on the ground of Burton's newly discovered evidence.

1. Law

Under section 1181, subdivision 8, a new trial may be ordered when "new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." In ruling on the motion, the trial court considers the following factors: "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a *different result probable on a retrial* of the cause; 4. That the party *could not with reasonable diligence have discovered and produced it at the trial*; and 5. That these facts be shown by the best evidence of which the case admits. [Citations.]" (*People v. Turner* (1994) 8 Cal.4th 137, 212. Italics added.) We review the trial court's decision for an abuse of discretion. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1251–1252.) In so doing, we recognize that "the trial court is in the best

position to determine the genuineness and effectiveness of the showing in support of the motion.” (*People v. Minnick* (1989) 214 Cal.App.3d 1478, 1481.)

2. Analysis

It was not an abuse of discretion for the trial court to conclude that Espitia, with reasonable diligence, could have discovered Burton’s evidence earlier and produced it at trial. Certainly it would be reasonable for Espitia’s defense team to interview the residents who lived in the apartments in the area of the shooting at the time of the shooting, yet Espitia makes no showing that this effort was undertaken or would not have revealed Burton’s evidence. Burton states in her affidavit that the shooting took place “the same day I *moved*,” but it is not clear that this means the day she moved *out* of the apartment complex. And even if it does, it would still be reasonable for Espitia’s defense team to try to find people who lived in the apartment complex at the time of the shooting, whether they still lived there or not. Espitia has not demonstrated that this was even attempted.

Furthermore, even if the defense could not have uncovered the evidence in this manner, Burton told Espitia’s sister about the incident roughly a year after the July 2011 incident—in other words, around July 2012. Trial did not begin until six months later on January 2, 2013, and the defense did not rest its case until January 23, 2013. There is no showing that, with reasonable diligence, Burton—who knew Espitia’s sister and whose sister was friends with Espitia’s sister—could not have been secured as a witness for trial. Indeed, there was no specific evidence in the new trial motion stating why Burton’s evidence was not discovered earlier, or why it was not presented at trial. To the contrary, Espitia used the Burton affidavit to support his argument in moving for a new trial on the ground that defense counsel had improperly failed to call Burton as a witness at the trial, suggesting that Burton’s testimony may have been known to the defense *before* the trial ended.

Moreover, it was not an abuse of discretion for the trial court to conclude that Espitia failed to establish the new evidence from Burton would render a “different result probable” on retrial. (*Turner, supra*, 8 Cal.4th at p. 212, see also § 1181 (8).) In essence,

Burton claimed that she saw a speeding SUV around the time of the murder and that Arroyo had said Espitia was beating him when the shots were fired. Ostensibly, this alleged statement by Arroyo is inconsistent with his testimony that the shots were fired a few minutes after Espitia walked away, and Espitia could not have been shooting Nears at the same time he was beating Arroyo. But Burton's affidavit does not provide the sort of evidence that would have caused a jury to disbelieve Arroyo's sworn trial testimony and acquit Espitia of the murder.

First, Arroyo's testimony—that the shots were fired minutes after Espitia had left—was corroborated at trial by the sworn testimony of Jackson, who also stated that the shots occurred minutes after Espitia left. Further corroboration may be found in Espitia's text message recounting that he "[fieri]d] on" a "scrap" (which likely referred to the assault on Arroyo, since Nears was not a Sureño), which he sent at 9:13 p.m., four minutes before the police dispatch regarding shots fired.

Second, Burton's account of the events is inconsistent with the testimony provided by disinterested eye-witnesses at trial. Not one of the witnesses testified that a black SUV was speeding out of Alamo Gardens after the shots were fired. James did not testify that he saw or heard a SUV approaching or leaving around the time of the shooting, or that any vehicle was chasing anyone; he told police and testified that the only person around at the time was the assailant, who approached on foot from the opposite direction, and who fled the scene by running across the street.

Third, the evidence identifying Espitia as the murderer was more than substantial. It was undisputed that Espitia was at Alamo Gardens, and only he had a prior confrontation with Nears in which he displayed a gun and said he "had something" for him. James told Nears's mother that it was Espitia who murdered her son. Detective Lechuga testified that James identified Espitia as the shooter in a photographic display. Espitia appeared to be carrying a gun when he assaulted Arroyo, he pictured himself with a .38 caliber Smith & Wesson revolver, and the bullets found in Nears's body were consistent with having been fired from a .38-caliber Smith & Wesson. According to Arroyo, Espitia appeared at Alamo Gardens wearing dark jeans or shorts and a white shirt

with his hair in a ponytail; according to Jackson, Espitia was wearing shorts and a white or black shirt, and his hair in a ponytail with the sides shaved. Similarly, James told the police at the scene that Nears's murderer was wearing blue shorts and a white T-shirt, and had short black hair, and he testified at trial that the murderer wore dark blue shorts and a white T-shirt and his hair was short or could have been slicked back—all reasonably consistent with Espitia's hair, worn in a ponytail with the sides shaved.

Espitia fails to show an abuse of discretion in the denial of his new trial motion.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

BRUINIERS, J.

(A141533)